had enormous political influence, Congress expressly prohibited state and local governments from impairing the ability of any potential provider to enter any telecommunications market:

> SEC. 253. REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

As reflected in a colloquy on the Senate floor between Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, the 104th Congress understood that Section 253(a) originated in S.1822 and had "no problem" with its scope. 141 Cong. Rec. at S8174 (June 12, 1995). Thus, the 104th Congress incorporated the key operative terms of the preemption provision of S.1822 *verbatim* into § 253(a) of the 1996 Act. There was no need for elaborate legislative history, but what there was corroborated that the 104th Congress understood and intended that the term "any entity" apply to municipalities and municipal electric utilities.

In the Joint Explanatory Statement of the Committee of Conference, the conferees noted that electric utilities may "choose" to provide telecommunications services, and they made clear that Congress intended that such choices be unencumbered by state or local barriers to entry:

> New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to provide telecommunications services.* Existing State laws or regulations that reasonably condition telecommuni-cations activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section.*

H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 127 (1996). Referring to this passage, its author, Congressman Dan Schaefer (R-CO), subsequently confirmed in a letter to former FCC Chairman

Reed Hundt that "Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition," that "any prohibition on their provision of this service should be preempted," and that the Commission "must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control.*" (J.A.___). In reply, Chairman Hundt assured Congressman Schaefer that the Commission's staff would place his letter in the record of the Texas case and consider it carefully. (J.A.___). The letter was not included in the record, nor was it even mentioned in the Texas decision.[3]

In another letter to Chairman Hundt, Senator J. Robert Kerrey (D-NE) was even more emphatic about Congress's intent in enacting Section 253:

> Anti-competitive laws passed by state and local governments pose a real threat to the development of competition in local telecommunications markets. In the wake of the Telecommunications Act, several states have passed legislation that prohibits or significantly impairs the ability of publicly-owned utilities to provide telecommunications services themselves or to make their facilities available to other potential providers of telecommunications services. I am concerned that these actions are significantly delaying consumers ability to exercise their economic power by choosing between local telecommunications carriers.
>
> Congress created Section 253 of the Telecommunications Act to address this problem by granting the Federal Communications Commission (FCC) authority to preempt state and local legal requirements that pose a barrier to entry into telecommunications by "any entity." *The law makes no distinction among types of entities or forms of ownership.* Section 253 states, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *In using the term "any entity," Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets.*

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[3] Compare the Commission's initial Certified List of Items in the Record, which it filed on December 11, 1997, with its supplemental list, which it filed on May 7, 1998 at the request of counsel for the petitioners.

(J.A.___) (emphasis added). Senator Kerrey's letter received the same treatment as Congressman Schaefer's -- it was neither included in the administrative record of the Texas case nor mentioned in the Texas decision.

4. Section 703 of The Telecommunications Act

While it was considering Section 253, Congress was also working on major amendments to the pole-attachment requirements in Section 224 of the Communications Act of 1934. The resulting measure -- Section 703 of the Telecommunications Act -- is the exception that proves the rule. In that provision, Congress showed that it knows how to distinguish "political subdivisions" and "instrumentalities" of a state from other entities when it wants to do so.

In Section 703(1), Congress amended the definition of a "utility" in Section 224(a)(1) of the 1934 Act to include "a local exchange carrier or an electric, gas, water, steam, or other public utility, who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." In Section 703(7), Congress imposed upon all firms meeting the new definition of "utility" an obligation to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Elsewhere, Section 703 authorized the Commission or the states to regulate the rates, terms and conditions for pole attachments, prescribed timetables for issuing regulations to implement Section 703, and specified some of the key requirements that the Commission's regulations must contain.

At the same time, Congress elected to preserve and reaffirm the exemption that local governments have traditionally had from federal pole-attachment requirements. Congress did so by

leaving intact Sections 224(a)(1) and 224(a)(3) of the 1934 Act.[4] Thus, solely for the purposes of the pole attachment requirements of Section 224, Section 224(a)(1) states that the term "utility" does not include "any railroad, any person who is cooperatively organized, or any person who is owned by the Federal Government or any State." Section 224(a)(3), in turn, defines the term "State" as "any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or instrumentality thereof*" (emphasis added).

Notably, although it could easily have done so, Congress did not similarly limit the term "entity" in Section 253(a).

5. The Commission's Decision

On May 13, 1996, the attorney general of Texas issued an opinion letter finding that Section 3.251(d) precluded San Antonio's municipal electric utility from leasing fiber optic cable to ICG for use in competing with the monopoly local exchange carrier in San Antonio -- Southwestern Bell. ICG promptly petitioned the Commission to preempt Section 3.251(d). Later, the City of Abilene filed another challenge to Section 3.251(d), posing the issue whether a municipality that does not operate an electric utility is covered by the term "any entity" in Section 253(a).

On October 1, 1997, after ICG withdrew its petition, the Commission released a Memorandum Opinion and Order limited to the facts presented by the City of Abilene. *Texas Order*, ¶ 179. The Commission's key findings appeared in the following passages of the *Order*:

- "We do not preempt the enforcement of PURA95 section 3.251(d) because we conclude that the city of Abilene is not an "entity" separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act. We also find that preempting the enforcement of PURA95 section 3.251(d) would insert the

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[4] The phrase "[a]s used in this section" in Section 224(a) restricts the definitions in the subsections that follow to the pole-attachment requirements of Section 224.

Commission into the relationship between the state of Texas and its political subdivisions in a manner that was not intended by section 253." *Texas Order*, ¶ 179.

- "PURA95 section 3.251(d), which precludes a municipality or municipal electric system from providing telecommunications services, is an exercise of the Texas legislature's power to define the contours of the authority delegated to the state's political subdivisions. In this case, the Texas legislature defined those contours by denying its municipalities the authority to engage in certain activities." *Texas Order*, ¶ 180.

- "The scope of the authority delegated by a state to its political subdivisions is an area that traditionally has been within the purview of the states. . . . With regard to such fundamental state decisions, including, in our view, the delegation of power by a state to its political subdivisions, therefore, *Ashcroft* suggests that states retain substantial sovereign powers "'with which Congress does not readily interfere' absent a clear indication of intent." *Texas Order*, ¶ 181.

- "Despite our decision not to preempt, we encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications such as that found in PURA95. Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services. At the same time, we recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition." *Texas Order*, ¶ 190.

The Commission also made various other points in response to contentions of the parties. These points are addressed below in part II of the petitioners' Argument.

6. Subsequent Commission Interpretations

In the period since the issuance of the *Texas Order*, the Commission has had several opportunities to construe the terms "any" and "entity." Each time, it has done so in a way that is inconsistent with its interpretation in the *Texas Order*. The Commission's recent report and order on pole attachments furnishes a good example.

As to the term "any," the Commission declined to distinguish between pole attachments by wire and wireless providers of telecommunications service, reasoning as follows:

> Statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) previously defined a pole attachment as "any attachment by a cable television system," but now states that a pole attachment is "any attachment by a cable television system *or provider of telecommunications service*." [Emphasis in original.] Moreover, in Section 224(d)(3), Congress applied the current pole attachment rules as interim rules for "any telecommunications carrier . . . to provide any telecommunications service." In both sections, *the use of the word "any" precludes a position that Congress intended to distinguish between wire and wireless attachments*. Section 224(e)(1) contains three terms whose definitions support this conclusion. Section 3(44) defines telecommunications carrier as "any provider of telecommunications services." Section 3(46) states that telecommunications services is the "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and Section 3(43) specifies telecommunications to be "the transmission, between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received." *The use of "any" in Section 3(44) precludes limiting telecommunications carriers only to wireline providers.*

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Report and Order*, FCC 98-20, 1998 WL 46987, ¶ 40 (rel. February 6, 1998) (emphasis added) (footnotes omitted) ("*Pole Attachment Order*").[5]

Later in the same order, the Commission not only applied the term "entities" to local governments but also acknowledged that such "entities" can be expected to provide telecommunications or cable services:

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[5] In citing this order, petitioners express no opinion on the correctness of the Commission's views on pole attachments. Rather, petitioners merely note that the Commission has generally interpreted the term "any" in its broadest sense.

> The *Notice* proposed that *government entities* with attachments, like other entities present on the utility pole, be counted as *entities* on the pole for purposes of allocating the costs of unusable space. . . .
>
> . . . *To the extent that government agencies provide cable or telecommunications service*, we affirm our proposal that they be included in the count of attaching entities for purposes of allocating the cost of unusable space. We will not include government agencies in the count as a separate entity if they only provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. We conclude that, *where a government agency's attachment is used to provide cable or telecommunications service*, the government attachment can accurately be described as a "pole attachment" within the meaning of Section 224(a)(4) of the 1996 Act.

Pole Attachment Order, at ¶¶ 52, 54 (emphasis added).

When evaluating the effects of the *Pole Attachment Order*, the Commission again confirmed that it considers local governments to be "entities."

> The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000." *There are 85,006 governmental entities in the United States. This number includes such entities as states, counties, cities, utility districts and school districts.* We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments pursuant to Section 224(c)(1). *Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states.* Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

Pole Attachment Order, ¶ 165 (emphasis added).

Other recent examples of the Commission's treatment of municipalities as "entities" include: *In the Matter of Federal-State Joint Board on Universal Service . . .*, CC Docket No. 96-45, *Fourth Report on Reconsideration of CC Docket no. 96-45 . . .*, FCC 97-420, ¶ 166 (rel December 30, 1997) (municipalities are eligible "entities" for the purposes of participating in consortia that are eligible for universal service subsidies); *Instructions For Completing Universal Service Worksheet*,

FCC Form 457 (rel March 4, 1998) (local government entities are subject to universal service contribution obligations if they provide "telecommunications service[s]" or "interstate telecommunications"); *In the Matter of Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Report to Congress*, FCC 98-67, ¶ 118 (rel April 10, 1998) (lead governmental entities are subject to universal service contribution obligations if they provide "interstate telecommunications" to other members of purchasing consortia).

SUMMARY OF ARGUMENT

1. Pursuant to Section 402(a) of the Communications Act of 1934 and Section 706(2)(A) of the Administrative Procedure Act, this Court may invalidate and set aside a final Commission order that is "not in accordance with law." The petitioners submit that the Commission's failure to preempt Section 3.251(d) of PURA95 violated Section 253 of the Telecommunications Act. In arriving at its decision, the Commission erroneously scanned the Act and legislative history for an express statement that the term "any entity" in Section 253(a) applies to municipalities. The Commission did not perform the searching analysis of the language, structure, legislative history and purposes of the Act that the Supreme Court and this Court require to determine the "plain" meaning of the Act. Had the Commission performed such an analysis, it would have found compelling evidence that Congress did indeed intend to apply the term "any entity" in Section 253(a) to municipalities, whether or not they operate electric utilities.

2. Pursuant to Section 402(a) of the Communications Act of 1934 and Section 706(2)(A), this Court may also invalidate and set aside a final Commission order that is the product of arbitrary and capricious agency action. The petitioners submit that the Commission acted in an

arbitrary, capricious and discriminatory manner in this case by failing to furnish a reasoned basis for applying different standards in the relevant portions of the *Texas Order* than it applied elsewhere in the *Order* as well as in numerous other Commission orders.

ARGUMENT

The *Texas Order* is subject to review in this Court under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Telecommunications Resellers Ass'n v. Federal Communications Comm'n*, 1998 WL 201590 (D.C.Cir.); *Melcher v. Federal Communications Comm'n*, 134 F.3d 1143, 1149 (1997). Section 706(2)(A) authorizes the Court to hold the *Texas Order* unlawful and set it aside if the Court finds the *Order* to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As shown below, the Order is not in accordance with Section 253 of the Telecommunications Act and is the product of arbitrary and capricious agency action.

I. THE *TEXAS ORDER* IS CONTRARY TO SECTION 253 OF THE TELECOMMUNICATIONS ACT

The petitioners and the Commission agree that "the ultimate question underlying any preemption analysis is 'whether Congress intended that federal regulation supersede state law,'" *Texas Order*, ¶ 51, quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). All agree that Congress has authority to preempt exercises of "fundamental" or "traditional" state powers and that, in cases involving such powers, the key question is whether Congress has in fact exercised its authority. All agree that the Supreme Court in *Ashcroft* articulated the relevant standard for answering that question. The petitioners are also willing to assume (without conceding) that the

Texas legislature's enactment of Section 3.251(d) of PURA95 was an exercise of its "fundamental" or "traditional" powers. The parties differ only on whether the Commission properly interpreted and applied the *Ashcroft* standard in this case. The petitioners submit that the Commission did not, because the language, structure, legislative history and purposes of the Telecommunications Act compel the conclusion that Congress intended that the term "any entity" in § 253(a) apply to municipalities and municipal electric utilities.

A. The Relevant Standards

1. Preemption Analysis

As the Commission noted in the Texas case, quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69 (citations omitted):

> "Pre-emption occurs when Congress, in enacting a federal statute, *expresses a clear intent to preempt state law*, when there is *outright or actual conflict between federal and state law*, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or *where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress*."

Texas Order, ¶ 33 (emphasis added). Preemption is warranted in this case under any of the criteria highlighted above.

Article VI, Clause 2, of the Constitution of the United States provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Since 1819, when the Supreme Court's decided *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled law that any state measure that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Preemption analysis "[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" in determining the effect of federal law on state legislation. *Malone v. White Motor Corp.*, 345 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). In ascertaining whether Congress intended to preempt a state law, the starting point is "'the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

When Congress makes express provision for preemption, the inquiry is an "easy one." *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). Indeed,

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and where that provision provides a reliable indicium of congressional intent with respect to state authority . . . there is no need to infer congressional intent to pre-empt from the substantive provisions of the legislation.

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992).

"When a federal statute unambiguously forbids the States to impose a particular kind of [law], courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a [law] is preempted." *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7, 12 (1983). But if a statute itself does not completely answer the question, agencies and

courts must evaluate all other traditional indicia of congressional intent. *Bell Atlantic Telephone Companies v. Federal Communications Comm'n*, 131 F.3d 1044 (D.C.Cir. 1997).

There was a time when uncertainties existed about whether Congress could preempt state laws dealing with "fundamental" or "traditional" state functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), the Supreme Court laid these uncertainties to rest:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them.

Id. at 546-47. The proper place to look, the Supreme Court concluded, is the federal political process:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress's authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 555.

In *Ashcroft*, the Supreme Court set forth the relevant standard for determining whether Congress intended to preempt state laws involving "traditional" or "fundamental" state functions -- Congress must have made a "plain statement" to that effect. *Id.* at 467. The statement need not be express, but Congress's intent must be "plain to anyone reading the Act." *Id.* ("This does not mean

that the Act must mention [the allegedly preempted subject] explicitly, though it does not. But it must be plain to anyone reading the Act that it covers [the allegedly preempted subject]") (citations omitted).

2. Standards for Determining the "Plain Meaning" of a Statute

In determining whether a statute has a "plain meaning," agencies and courts must consider "not only the language of the particular statutory provision under scrutiny, but also the structure and context of the statutory scheme of which it is a part." *Illinois Public Telecommunications Ass'n v. Federal Communications Commission*, 17 F.3d 555, 568 (D.C.Cir. 1997), citing *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C.Cir. 1990). In the *Bell Atlantic* case, the D.C. Circuit succinctly summarized the interpretative process as follows:

> *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), governs review of agency interpretation of a statute which the agency administers. Under the first step of *Chevron*, the reviewing court "must first exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C.Cir. 1995) (quoting Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. at 2782 n.9). The traditional tools include examination of the statute's text, legislative history, and structure, *see Southern California Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C.Cir. 1997); as well as its purpose, *see First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C.Cir. 1996). *This inquiry using the traditional tools of construction may be characterized as a search for the plain meaning of the statute*. If this search yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate.

Id. at 1047 (emphasis added). Application of this process in this case yields compelling proof that Congress intended that § 253 apply to state barriers to entry by municipalities and municipal electric utilities.

B. The Language, Structure, Legislative History and Purposes of the Telecommunications Act Require Preemption of State Barriers to Municipal Involvement in Telecommunications Activities

1. The Language and Structure of the Act

The term "entity" is not defined in § 253(a) of the Telecommunications Act or in the definitions in 47 U.S.C. § 153 that apply generally throughout the Act unless expressly overridden by section-specific definitions. It must therefore be given its ordinary meaning. *Morales*, 504 U.S. at 383; *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.") Standing alone, the term "entity" is broad enough to include municipalities and municipal electric utilities. As this Court recently found in *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066 (D.C.Cir. 1997),[6] definitions of "entity" found in standard non-technical dictionaries include (1) "something that exists as a particular and discrete unit," (2) a "functional constituent of a whole" and (3) "the broadest of all definitions which relate to bodies or units." *Id.* at 1069. Municipalities and municipal electric utilities meet all of these definitions.

It is not appropriate, however, to view the term "entity" in isolation. "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of the statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citations and inner quotations omitted). In the oft-quoted words of Judge

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[6] In the *Alarm Industry* case, this Court rejected an unduly restrictive Commission interpretation of the term "entity" in Section 275 of the Act, finding that this term should ordinarily be given its broad, common meaning. The Court declined to afford the Commission's interpretation any deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Alarm Industry*, 131 F.3d at 1069.

Learned Hand, "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). Likewise, this Court recently observed that "textual analysis is a language game played on a field known as 'context.' The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use." *Bell Atlantic*, 131 F.3d at 1047.

In § 253(a), the term "entity" is preceded by the word "any" and followed by the phrase "to provide any interstate or intrastate telecommunications service." Both modifiers furnish valuable information about Congress's intent. As to the term "any," Congress could not have used a more expansive adjective. As explained in *Corpus Juris Secundum*:

> The word "any" is frequently used in a broad distributive sense, with what is described as its natural, ordinary, or usual signification. In this, its ordinary sense, it is a word which is broad and general, and comprehensive, and broadly inclusive, and all embracing. As so used, the term has a most comprehensive meaning, and a plural signification, implying unlimited choice as to the particular unit.

3A *C.J.S.* at 903. "Unless modified by the context, the term includes all persons and things referred to indiscriminately; it negatives the idea of exclusion." *Id.* "Any" is further defined as meaning indiscriminate, without limitation, or restriction, 3A *C.J.S.* at 905, and has been held to mean "any and all," "all or every," "each," "each one of all," or "every." *Id.* at 904. *Webster*'s similarly defines "any" as:

> 1. One indifferently out of a number; one (or, as pl. some) indiscriminately of whatever kind; specif.: a. Indicating a person, thing, event, etc., as not a particular or determinate individual of the given category but whichever one chance may select;... b. indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that every one is open to selection without exception . . .

Webster's New International Dictionary 121 (2d ed. 1957). Furthermore, as noted above, the Commission has itself recently held in the *Pole Attachment Order* that, when Congress used the term "any" in the Telecommunications Act, it intended to deny the Commission authority to draw distinctions Congress did not make itself. *Pole Attachment Order*, ¶ 40.

To be sure, even the term "any" can have a limited meaning in some contexts, as this Court held in the *Bell Atlantic* case, 131 F.3d at 1047. But nothing in the Telecommunications Act suggests that Congress intended to give that term anything but its broadest possible meaning in § 253(a). The juxtaposition of "entity" and "telecommunications service" in § 253(a) reinforces this conclusion.

In the FCC's recent report to Congress explaining its interpretations of the key definitions in the Telecommunications Act, the Commission noted that it understood the term "telecommunications service" to be Congress's primary tool for allocating burdens and incentives among covered persons to achieve Congress's purposes under the Act.[7] For example, providers of "telecommunications service" must, among other things, comply with the interconnection requirements imposed by Section 251, with the universal service contribution obligations imposed by Section 254, with the common carrier duties imposed by Title II of the Communications Act, and with the consumer privacy requirements imposed by Section 222. At the same time, the Act encourages persons to provide telecommunications service by affording them non-discriminatory access to poles, ducts, conduits and rights of way under Section 224, opportunities for interconnection under Section 251, universal service subsidies under Section 254, and protection from state barriers and local barriers to entry under Section 253. None of these provisions distinguishes between public and private providers of

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[7] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, FCC 98-67, at ¶ 32 (rel. April 10, 1998).

telecommunications service. Indeed, it would be unreasonable to suppose that Congress intended to subject public entities to the burdens of the Act without also affording them the corresponding benefits.

Second, as discussed in the Statement of Facts, Part 4 above, Congress explicitly distinguished "political subdivisions" and "instrumentalities" of a state from privately-owned entities for the purposes of the pole-attachment provisions in Section 224 of the Act and at the same time conspicuously failed to do so for the purposes of § 253(a). The Commission has itself underscored the significance of such a distinction. For example, in its recent consumer privacy order, the Commission noted that "[w]hen Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 98-27, ¶ 32 n.113 (rel. February 26, 1998), quoting *Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996).

Third, as the Commission observed in the *Texas Order*, ¶ 2, Section 253 was part of Congress's careful scheme of allocating responsibilities among the federal government and the states. On the one hand, in Sections 251, 252 and 254, Congress sought to foster a partnership among the federal government and the states in implementing the local competition and universal service goals of the Act. While the Commission, the states, affected parties and the courts may disagree over the precise terms of the partnership, all concur that Sections 251, 252 and 254 provide for some form of joint responsibility among the federal government and the states.

On the other hand, in Section 253(a) Congress flatly prohibited states from erecting barriers to entry by "any entity," and in Section 253(d) Congress *required* the Commission to preempt any such measures that the state could not show to be "necessary" to achieve one or more of the four public purposes expressly set forth in Section 253(b). The inclusion of an explicit preemption provision would itself have been a clear sign that Congress intended to restrict state authority, but Congress went well beyond that in spelling out precisely the role that states could legitimately play under the statutory scheme. Given the specificity and clarity with which Congress acted in Section 253, it would surely have inserted the word "private" between "any" and "entity" in Section 253(a) if that had been its intent. By attributing such intent to Congress, the Commission acted beyond its authority and usurped Congress's prerogative to make policy decisions.

2. Legislative History

The legislative history of Section 253(a) -- which the Commission did not analyze at all in the *Texas Order* -- is particularly instructive. As shown above, that history makes it crystal clear that Congress understood that municipalities and municipal electric utilities could help provide or facilitate competition to telecommunications markets, especially in rural areas; that Congress intended to encourage municipalities and municipal electric utilities to play these roles in their communities; and that Congress manifested this intent through the definitions and preemption provisions of the Act. Indeed, the legislative history expressly confirms these points.

3. The Purposes of the Act

In the Commission's own words, Congress enacted the Telecommunications Act to create a "pro-competitive, deregulatory national policy framework" that would enable "*all* providers to enter *all* markets." *Texas Order*, ¶ 1; *Interconnection Order*, ¶ 4 (emphasis added). Congress enacted Section 253, again in the Commission's words, "to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipalities or states, including . . . the actions of state legislatures." *Texas Order*, at 4.

Obviously, state barriers that impair the ability of municipalities and municipal electric utilities from providing or facilitating the provision of telecommunications services in their communities are inconsistent with these goals. The Commission itself acknowledged this when it urged other states not to do what Texas had done, finding that "[m]unicipal entry can bring *significant benefits* by making additional facilities available for the provision of competitive services." *Texas Order*, ¶ 190 (emphasis added).

According to the Commission, Congress "envisioned the emergence of robust competition among multiple service providers in all industry segments, with market forces supplanting regulation as markets become fully competitive." *Texas Order*, at ¶ 1. In Texas, however, Section 3.251(d) of PURA95 has rendered that vision illusory. Section 3.251(d) has insulated Southwestern Bell from competition from ICG in San Antonio. It has thwarted the City of Abilene's economic development and left the City's residents at the mercy of Southwestern Bell's own expansion plans. It has also impaired the ability of scores of other communities in Texas to obtain the full benefits of the

Information Age promptly and at affordable prices. And it has frustrated Congress's goal of creating robust competition in all telecommunications markets.

In short, Section 3.251(d) "stands as an obstacle to the accomplishment and execution of the full objectives of Congress," *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69 (citations omitted), and it must therefore be preempted. The Commission not only had ample authority, but also the duty to do so, and its failure to act was clearly erroneous.

II. THE COMMISSION'S DENIAL OF PREEMPTION OF SECTION 3.251(d) WAS ARBITRARY AND CAPRICIOUS

The Commission's refusal to preempt Section 3.251(d) cannot be reconciled with other Commission preemption decisions or with other recent Commission interpretations of the terms "any" and "entity." It was therefore arbitrary and capricious. *Independent Petroleum Ass'n of Amer. v. Babbitt*, 92 F.3d 1248, 1259 (D.C.Cir. 1996) (agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so); *Airmark Corp. v. FAA*, 758 F.2d 685, 692-95 (D.C.Cir. 1985) (inconsistent application of decisional criteria was arbitrary and capricious); *National Association of Broadcasters v. Federal Communications Comm'n*, 740 F.2d 1190, 1201 (D.C.Cir. 1984) (agency could not depart from its conclusion in a prior decision without reasoned explanation); *Ace Motor Freight, Inc. v. ICC*, 557 F.2d 859, 863 (D.C.Cir. 1997) (absent rational explanation, different treatment of similarly-situated parties is arbitrary and capricious).

A. The Commission's Denial of Preemption of Section 3.251(d) Is Inconsistent With Its Rationale In the *Classic Telephone* Case

In *Classic Telephone*, two Kansas cities, believing that their communities could not support more than one provider of telephone service, denied franchises to prospective competitors. The

ATTACHMENT B

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 2, 1998

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1633 and No. 97-1634 (consolidated)

CITY OF ABILENE, TEXAS, et. al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

FINAL PETITIONERS' REPLY BRIEF

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August 13, 1998

II. SECTION 253(a) SATISFIES *ASHCROFT'S* "PLAIN STATEMENT" RULE

Citing *Ashcroft*, 501 U.S. at 464, the Commission claims this Court must uphold the Commission's rejection of Abilene's petition for preemption because this case involves "traditional" and "fundamental" state powers, and Section 253(a) does not make it "absolutely certain" that the term "any entity" covers municipalities. FCC's Brief at 12. The Commission goes on to discuss various considerations that allegedly made it impossible for the Commission to be "absolutely certain" that Congress intended that the term "entity" in Section 253(a) cover municipalities. The Petitioners will address each of these considerations in turn, but first we pause to emphasize a significant omission from the Commission's analysis – its failure to address the Supreme Court's unanimous recent decision in *Salinas v. United States*, 118 S.Ct. 469 (1997).[3]

In *Salinas*, the issue was whether Congress's "expansive, unqualified" use of the term "any" preceding the clause "transaction, business or series of transactions" in 18 U.S.C. § 666 left the defendant room to argue that such transactions or business must involve federal funds. The Court answered this question in the negative – "The word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." *Id.* at 473. Distinguishing *Ashcroft* on the ground that the statute in that case was ambiguous, the *Salinas* Court noted that "[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Id.* at 475. While acknowledging the need "to give proper respect to the federal-state balance," the Court concluded, "'We cannot press statutory construction to the point of disingenuous evasion even to

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n.5, 54 L.Ed.2d 538 (1978) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944))).

[3] UTC, The Telecommunications Association, called *Salinas* to the Commission's attention in Intervenor's Brief in Support of Petitioners, at 23.

avoid a constitutional question,'" quoting *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1124, n.9 (1996). The Supreme Court's analysis applies equally well to Congress's expansive, unrestricted use of "any" before "entity" in Section 253(a).[4]

The Commission begins its response with the assertion that it could not be "absolutely certain" that Congress intended the term "entity" in Section 253(a) to cover municipalities because the Supreme Court has long held that municipalities are not "independent" or "sovereign" entities. FCC's Brief at 13-14. The Commission does not explain how this narrowing construction can be reconciled with Section 253(a)'s unrestricted use of the modifier "any" rather than "independent" or "sovereign." The Commission does not address the Petitioners' point that the Commission's construction would undermine the detailed allocation of responsibilities among the states and the federal government that Congress laid out in the subsections of Section 253 and in the Act as a whole. The Commission does not attempt to reconcile its restrictive reading with the statutory purposes of opening "all telecommunications markets to all providers" and facilitating maximum choice by consumers. Nor does the Commission suggest that there is any support for its interpretation in the legislative history.

Next, the Commission turns to *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066, 1069-70 (D.C. Cir. 1977), in which this Court found that the Commission, in interpreting the term "entity" for the purposes of Section 275 of the Telecommunications Act, had improperly relied

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[4] The Supreme Court's analysis in *Salinas* is strikingly similar to the Commission's own analysis in its *Pole Attachment Order*. As the Petitioners pointed out in their opening brief, at 21, the Commission found that "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments. . . . The use of 'any' in Section 3(44) precludes limiting telecommunications carriers only to wireline providers." *Pole Attachment Order*, ¶ 40.

solely on a restrictive technical definition in *Black's Law Dictionary* without making any attempt to reconcile its interpretation with the purposes of Section 275.

In their opening brief, the Petitioners observed that at least three of the definitions that the Court had quoted from standard non-technical dictionaries cover municipalities and municipal electric utilities. Petitioners' Brief at 28. In its response, the Commission does not disagree with the Petitioners' point. Rather, it contends that the Court's finding in *Alarm Industry* that the meaning of "entity" is "uncertain" supports the Commission's determination in the *Texas Order* that the term "entity" in Section 253(a) does not plainly include municipalities. FCC's Brief at 14.

The Commission's analysis is incorrect. In *Alarm Industry*, the question before the Court was whether the term "entity" could be read *only* in the restrictive way that the Commission had interpreted it. The Court answered that question in the negative, relying on several non-technical dictionaries to prove its point. Here the question is fundamentally different. Because "entity" in Section 253(a) is preceded by "any" – unlike "entity" in Section 275 – the question is whether the term "entity" is *broad* enough to encompass municipalities. Since the Commission does not dispute that the definitions quoted in *Alarm Industry* cover municipalities, that case supports the Petitioners' argument and undermines the *Texas Order*.

Next, the Commission addresses the Petitioners' argument that the language before and after the term "entity" in Section 253(a) furnishes important information about how the term "entity" should be interpreted. First, without citing authority or explaining its point, the Commission baldly asserts that "[t]he use of the modifier 'any' cannot plausibly expand the reach of the word that it modifies." *Id.* at 15. Not only is this contention illogical, but it is also contradicted by *Salinas* and the Commission's own rationale in the *Pole Attachment Order*.